



Star LAW report

Bangladesh can not be the dumping ground for contaminated fertilizer

High Court Division (Special Original Jurisdiction)

The Supreme Court of Bangladesh

Writ Petition No. 3160 Of 2002 with

Writ Petition No. 3680 of 2002

M/s. Bulk Trade International (In Writ Petition No. 3160 of 2002),

UBINIG and another (In Writ Petition No. 3680 of 2002) V

The Commissioner, Customs, Customs House, PS Bandar, Chittagong and others (In Writ Petition No. 3160 of 2002),

Government of Bangladesh represented by the Secretary, Ministry of Agriculture Secretariat Building, PS Ramna, Dhaka and others (In Writ Petition No. 3680 of 2002)

Before Mr. Justice Md. Awlad Ali and Mr. Justice Mir Hashmat Ali

Judgment: September 8, 2002

Result: Rule discharged

Background

Mr. Awlad Ali, J.: The Rule was issued calling upon the respondents to show cause as to why the impugned Order dated 04.06.2002 passed by respondent no. 2 in the form of a handwritten note addressed to the shipping agent of MV Alkimos, with copy endorsed to, inter alia, the petitioner directing the shipping agent not to unload 13,497.928 metric tons of TSP fertilizer imported by the petitioner and not to issue delivery order thereon against should not be declared to have been issued without lawful authority and is of no legal effect as being violative of fundamental rights of the petitioner as guaranteed under Articles 27, 31, 40 and 42 of the Constitution.

The relevant facts for the disposal of the Rule are that the petitioner is a trading house carrying on business as an exporter, importer and supplier of bulk commodities including TSP fertilizer, under the name and style of M/s. Bulk Trade International. The petitioner is a member of the Bangladesh Fertilizer Association. The petitioner had established a Letter of Credit being L/C No. 141102020001 dated 29.4.2002 for US\$ 2,025,000/- in favour of Transammonia AG, New York (the supplier) for importation of 13,500 metric tons of TSP fertilizer manufactured by Cargill Fertilizer Inc., USA. The Letter of Credit was amended twice, once on 4.5.2002 and then 14.5.2002. The supplier performed the contract contained in the letter of credit by procuring the goods already afloat in the MV Alkimos and tendered shipping documents in negotiation of the letter of credit. The first set of shipping documents relating to 5,500 metric tons of goods included Bill of Lading No. 1 dated 14.5.2002, Invoice No. 02022289 dated 14.5.2002 issued by the supplier, Certificate dated 14.5.2002 issued by the manufacturer, Guarantee certificate dated 14.5.2002 issued by the beneficiary of the letter of credit, certificate of origin issued by the Chamber of Commerce of the domicile of the manufacturer, pre-shipment inspection certificate dated 14.5.2002 issued by the surveyors, SGS Switzerland SA. The second set of shipping documents relating to 4,500 metric tons of the goods are Bill of Lading No. 2 dated 14.5.2002 issued by the agent for and on behalf of the Master of the vessel, Invoice No. 02022290 dated 14.5.2002 issued by the supplier, Certificate dated 14.5.2002 issued by the manufacturer, Guarantee certificate dated 14.5.2002 issued by the beneficiary of the letter of credit, certificate of origin issued by the Chamber of Commerce of the domicile of the manufacturer, pre-shipment inspection certificate dated 14.5.2002 issued by the surveyors. The third set of shipping documents of the same kind for 3,497.928 metric tons of fertilizer were issued by the different authorities as aforesaid. In order to release the goods on payment of customs duties, VAT and other charges the petitioner through its clearing and forwarding agents submitted shipping documents along with bill of entry no. C 88560 dated 30.5.2002 to the Customs Authorities and the Customs Authority having received the bill of entry assessed the goods in due course and the petitioner paid all assessed customs duties and other charges on 1.6.2002 and all port charges on 2.6.2002. In the meantime, the vessel arrived at the Chittagong Port outer anchorage on 2.6.2002 and the Customs Authorities collected samples of the goods and carried out tests on the sample and found them to be Triple Super Phosphate (TSP) and endorsed the finding of their test on the back page of the Bill of Entry. Having observed all necessary formalities the petitioner took steps to have the goods lightered at outer anchorage and unloaded at Chittagong Port and at that stage the agent of the vessel received the impugned order dated 4.6.2002 issued by the Respondent No. 2 stopping unloading of the goods. Since the vessel has been lying at outer anchorage and as a result the petitioner has been suffering recurring demurrage at the rate of US\$ 7,000/- per day. The petitioner made inquiries and found that the impugned order had been issued at the behest of the Additional Secretary of the Ministry of Agriculture who had issued two memos being No. Krishi Moni 128/2002/825 and Krishi Moni 128/2002/826 both dated 30.5.2002 to the Secretary, Ministry of Shipping and the Respondent No. 3 with copies endorsed to the respondent No. 6. The said memos stated that there are allegations that attempts were being made by local importer to establish a letter of credit to import low quality and poisonous 12,000 metric tons of TSP and 18,000 metric tons of SSP fertilizer. They finally requested all concerned to take

emergency steps to ensure that letters of credit to import such goods were not established and such goods should not be released through Chittagong and Mongla Ports. From the inquiries it appeared that the goods were earlier not allowed to enter into Australia under Australian quarantine regime because the hold of the vessel was found to contain a few grains that offended Australian quarantine regime. It has been stated that chemical fertilizer such as the goods are covered by H.S. Code No. 31.02 to 31.04, which is covered in the restricted list of the Import Policy Order 1997-2002. The Ministry of Agriculture's specification is laid out in Notification No. 6/Shar-21/94/100 dated 17.4.95. The petitioner claimed that goods have been imported in conformity with the requirements as the petitioner submitted certificate of manufacturer, pre-shipment inspection certificate showing specifications of fertilizer, information regarding physical and chemical properties of the imported fertilizer, and specifications and the petitioner is entitled to obtain release of the goods without post landing inspection on condition that both the supplier and the importer would be responsible for detection of harmful materials. It is contended that the petitioner has a constitutionally guaranteed right under Article 40 to carry on trade subject to such restrictions as are imposed by law and that the goods have been imported in accordance with the Import Policy Order, otherwise the Customs Authorities would not have cleared the bill of entry. The petitioner is entitled to unload the vessel.

In his Affidavit-in-Opposition respondent no. 4 denying material allegations has stated that the petitioner did not import the fertilizer in question



Ship with contaminated fertilizer was waiting at Chittagong Port

directly from the real manufacturer or their representative. The importer imported the fertilizer from a floating vessel M.V. Alkimos. The respondent received secret information from various agencies like newspapers and also on Mr. Baset Howlader regarding the fertilizer in question. The Ministry of Agriculture informed the matter to the Chairman, National Board of Revenue. As per order respondent no. 2 the Preventive Officer restrained the petitioner from unloading the fertilizer from M.V. Alkimos on 4.6.2002. It has been further stated that fertilizer in question is reportedly poisonous and of low quality which contained cadmium, arsenic and other heavy metals which is harmful to soil, crop and environment, and harmful fertilizer is not importable under Import Policy. The fertilizer in question has not been imported in conformity with the requirements and specification of the import policy order 1997-2002 and the petitioner is not entitled to release the fertilizer in question without proper post landing inspection. The fertilizer cannot be unloaded under the provision of the import policy order 1997-2002 although the duty and charge had been paid by the petitioner. The Ministry of Agriculture did not know about the report as alleged. The Special Expert Committee of the Ministry of Agriculture found in their report the existence of Cadmium, lead, Arsenic and other heavy metals in the said fertilizer which is harmful for the soil, crops and environment. The fertilizer is used for cultivation of crops and the same is distributed under the control, supervision and protection of the Ministry of Agriculture to the peasants of this country. It is not ordinary merchandise imported by the importer which can be sold in the open market and even to a grocery shop owners. To regulate, import and distribution of the fertilizer there in laws enacted; the Import and Export Act, 1950 and thereunder the Authority concerned issued the Import Policy Order 1997-2002 and the Fertilizer Control Order 1999 which are the relevant laws for regulating the import of fertilizer to this country. It appears from the provisions of Import and Export Control Act, 1950 that the specification must be approved by the Ministry of Agriculture and it is also provided under Article 5(1) of the Fertilizer Control Order 1999 that beyond specification nobody is allowed to import any fertilizer or raw materials thereof but there is a condition to the effect that. No prior permission was obtained from the Ministry of Agriculture or from the Government of Bangladesh before importation of such fertilizer. Consequently, the Ministry of Agriculture being responsible for controlling the import of fertilizer and distribution of fertilizer under the aforesaid laws had the authority to issue direction to another Department of the government namely the Customs Authority to stop unloading of the fertilizer from the vessel M.V. Alkimos. Although the Customs Authority did not find fault with the other shipping documents but they are bound to follow the direction of the sovereign authority if that is issued under the authority of law. As regard the prayer for direction to constitute a committee as contemplated under Fertilizer Control Order 1999 it is seen the respondent has admitted in their Affidavit-in-Opposition that committee has already been formed under the said order and that has been notified in the gazette, and the petitioner may now pursue the said committee to examine the fertilizer in question as no definite opinion has been given by any authority as to whether the fertilizer is contaminated and poisonous, but unloading cannot be allowed in view of the facts and circumstances of the case. No further direction is necessary as prayed for.

Respondent no. 1, the Commissioner of Customs has filed a separate Affidavit-in-Opposition stating, inter alia, that the petitioner imported the fertilizer in question in violation of import policy order 1997-2002, for the reason that the Ministry of Agriculture ordered the respondent no. 3 to restrain unloading the fertilizer from M.V. Alkimos.

The petitioner has filed Affidavit-in-Reply to the Affidavit-in-Opposition filed by respondent no. 4 where it has been stated that respondent no. 2 or the National Board of Revenue or respondent no. 4 do not have any power or authority to stop unloading of the fertilizer from the vessel even where the goods were imported in breach of the provisions of the Import Policy Order. The respondents have not formed any committee under Article 5(4) of the Fertilizer (Control) Order, 1999 to examine the fertilizer in question and any unilateral assertion by the respondents regarding composition or quality of the goods is without any basis whatsoever, and has further stated that mere presence of cadmium, lead, arsenic or other heavy metal does not render the fertilizer harmful to crop, soil or environment. The petitioner imported the fertilizer in question only after the manufacturer of the fertilizer ensured that the same is not hazardous for human health, crop and environment.

At the conclusion of the hearing the petitioner has filed an application with a prayer that a direction may be made to respondents no. 1 and 4 to take necessary steps for constituting a committee pursuant to Article 5(4) of the Fertilizer Control (Order) 1999 vide Notification No 6/Shar-33/2001/199 dated 18.7.2002, published in the Bangladesh Gazette for inspection of the fertilizer imported by the petitioner under Bill of Entry dated 30.5.2002. In reply to that application respondent no. 4 has filed an Affidavit-in-Opposition contending that the Committee under Article 5 (4) of the Fertilizer Control Order, 1999 has been formed by the

Government and Gazette Notification has been issued and it has been stated that Bangladesh can not be the dumping ground for contaminated and rejected fertilizer and that the fertilizer does not conform to the regulatory requirements. The said committee is required to conduct chemical test if the goods have been imported into the contrary as per law. The fertilizer has been imported from the floating vessel M.V. Alkimos and which was imported after it was rejected by the Australian Government.

Deliberation

The question whether the fertilizer imported by the petitioner was in accordance with specification given by the Ministry of Agriculture is not to be determined by us. The Ministry had determined that question by a special expert committee. The pertinent question which is to be determined by us is whether the Ministry of Agriculture was under the law authorized to issue any direction to the Customs Authority to prevent unloading of the fertilizer in question having received information that the fertilizer imported by the petitioner and carried by the vessel M.V. Alkimos is otherwise harmful to the crops and environment of Bangladesh. The fertilizer is used for cultivation of crops and the same is distributed under the control, supervision and protection of the Ministry of Agriculture to the peasants of this country. It is not ordinary merchandise imported by the importer which can be sold in the open market and even to a grocery shop owners. To regulate, import and distribution of the fertilizer there in laws enacted; the Import and Export Act, 1950 and thereunder the Authority concerned issued the Import Policy Order 1997-2002 and the Fertilizer Control Order 1999 which are the relevant laws for regulating the import of fertilizer to this country. It appears from the provisions of Import and Export Control Act, 1950 that the specification must be approved by the Ministry of Agriculture and it is also provided under Article 5(1) of the Fertilizer Control Order 1999 that beyond specification nobody is allowed to import any fertilizer or raw materials thereof but there is a condition to the effect that. No prior permission was obtained from the Ministry of Agriculture or from the Government of Bangladesh before importation of such fertilizer. Consequently, the Ministry of Agriculture being responsible for controlling the import of fertilizer and distribution of fertilizer under the aforesaid laws had the authority to issue direction to another Department of the government namely the Customs Authority to stop unloading of the fertilizer from the vessel M.V. Alkimos. Although the Customs Authority did not find fault with the other shipping documents but they are bound to follow the direction of the sovereign authority if that is issued under the authority of law. As regard the prayer for direction to constitute a committee as contemplated under Fertilizer Control Order 1999 it is seen the respondent has admitted in their Affidavit-in-Opposition that committee has already been formed under the said order and that has been notified in the gazette, and the petitioner may now pursue the said committee to examine the fertilizer in question as no definite opinion has been given by any authority as to whether the fertilizer is contaminated and poisonous, but unloading cannot be allowed in view of the facts and circumstances of the case. No further direction is necessary as prayed for.

Decision

In view of our discussions and reasons stated and with the above observations the rule is discharged without any order as to costs. The application for direction dated 21.8.2002 is disposed of accordingly. Since the rule is discharged, Writ Petition No. 3680 of 2002 filed by UBINIG and another in the form of public interest litigation is disposed of.

Mr. Rokanuddin Mahmud with Mr. Imtiaz Mahmood and Mr. Mustafizur Rahman Khan, Advocates for petitioner in Writ Petition No. 3160 of 2002, Mr. Md. Asaduzzaman, Advocate for the Petitioners in Writ Petition No. 3680 of 2002, Mr. AF Hasan Arif, Attorney General with Mr. Adilur Rahman Khan, DAG, Mr. Borhanuddin, DAG, Mr. Md. Ibrahim Kahil, AAG, Mrs. Syeda Afzal Jahan, AAG and Mr. Mohammad Abdullah, AAG, for respondents no. 1&4. Mr. Md. Ohiullah with Mr. Md. Al-Amin Sarker for respondent no. 7.

from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate. (Article 33 clause 2 of the Constitution of the People's Republic of Bangladesh)

No one shall be subjected to arbitrary arrest, detention or exile. (Article 9 of the Universal Declaration of Human Rights, 1948)

Protection in respect of trial and punishment

No person shall be subject to torture or to cruel, inhuman, or degrading punishment or treatment. (Article 35 clause 5 of the Constitution of the People's Republic of Bangladesh)

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (Article 5 of the Universal Declaration of Human Rights, 1948)



The pictures were published in the Daily Janakantha on 6 November. Members of armed forces are punishing pedestrians in humiliating ways; compelling women to give scarf over heads. Giving such kinds of punishments is a violation of human rights and strictly prohibited by our constitution. The army authority, at a press briefing held on 6 November told that it would take actions if it got any allegation of harassing innocent people. Will the army take any action against the army personnel in the pictures and their commanding officers for violating people's constitutional rights.

Protection of right to life and personal liberty

No person shall be deprived of life or personal liberty save in accordance with law. (Article 32 of the Constitution of the People's Republic of Bangladesh)

Every one has the right to life, liberty and security of persons. (Article 3 of the Universal Declaration of Human Rights, 1948)

Safeguards as to arrest and detention

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. (Article 33 clause 1 of the Constitution of the People's Republic of Bangladesh)

Every person who is arrested and detained in custody shall be produced before the nearest magistrate within an period of twenty-four hours of such arrest, excluding the time necessary for the journey

Freedom of movement

Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh. (Article 36 of the Constitution of the People's Republic of Bangladesh)

Everyone has the right to freedom of movement and residence within the borders of each state. (Article 13 clause 1 of the Universal Declaration of Human Rights, 1948)

Freedom of assembly

Every citizen shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of public order or public health. (Article 37 of the Constitution of the People's Republic of Bangladesh)

Every one has the right to freedom of peaceful assembly and association. (Article 20 clause 1 of the Universal Declaration of Human Rights, 1948)

Protection of home and correspondence

Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health-

(a) to be secured in his home against entry, search and seizure; and

(b) to the privacy of his correspondence and other means of communication. (Article 32 of the Constitution of the People's Republic of Bangladesh)

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has a right to the protection of the law against such interference or attacks. (Article 12 of the Universal Declaration of Human Rights, 1948)

Rights enumerated in Articles 32, 33, 35, 36, 37 and 43 are regarded as fundamental rights by our constitution. These articles together with other articles containing other fundamental rights have found place in Part III of our constitution. Provisions of this Part are enforceable by law and any law inconsistent with them is void. One can move to the High Court Division for the enforcement of the rights conferred by this Part. The Constitution is the supreme law and every person of the country has an obligation to abide by the provisions of it. The military are also bound to abide by the provisions of our constitution. They are bound to respect the fundamental human rights set forth by the constitution.

So the military should not do any thing for which allegation can be raised against them that they are violating our constitutionally guaranteed human rights. The military should respect human rights for another important reason. The human rights set forth in the Universal Declaration of Human Rights are universally recognised and enjoy a status of customary international law. Bangladesh army has achieved a positive image by successfully discharging their duties as UN Peacekeepers. If our army now violate the internationally recognised human rights their image will definitely be tarnished abroad. 6,000 more soldiers are called in to join the ongoing Operation Clean Heart. It is speculated that the duration of the operation will not be short. We urge the military and other law enforcing bodies taking part in the operation to respect the constitutionally guaranteed and internationally recognised human rights so that the operation may finish without further detents.

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LAW week

Separation of judiciary demanded

Speakers at a seminar named "Good Governance in Bangladesh: Legal and Judicial Perspective" advocated for the separation of judiciary. The seminar organised by Bangladesh Ain Samity was held in the CIRDAP auditorium on 30 October. The speakers alleged that justice could not be delivered without separation of the judiciary from the executive. They also argued that the process of appointing judges of the higher court should be changed. In this regard a commission might be formed to appoint judges not only from the lawyers but also from other professionals. They also argued that a code of conduct should be formed for regulating the accountability of the judges and the lawyers. Dr. Kamal Hossain taking part in the discussion said that all the power lay to the people of the country according to our Constitution. So the people have a lot to do if their elected government do not work to fulfill their constitutional rights. He also said that army or the police could not eliminate the terrorism if national consensus could not be grown. He argued that national consensus is necessary to protect the Constitution. Dr. Hossain alleged that though we are independent we are more loyal to the government rather than to the Constitution. Prof. Sirajul Islam Chowdhury expressed that elimination of disparity from the society is necessary for the good governance. -Law Desk.